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Third report on reservations to treaties

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I. Introduction

A. The earlier work of the Commission on the topic

1. First report on reservations to treaties and the outcome

(a) The Special Rapporteur's conclusions in 1995

1. The topic "Reservations to treaties" was included in the Commission's agenda in 1994.

2. The Special Rapporteur submitted his first report in 1995.[1] In that report, he summarized the Commission's earlier work on reservations and its outcome, also setting out a brief list of the problems posed by the topic and making suggestions as to the scope and form of the Commission's future work on the topic.

3. The Commission considered the report at its forty-seventh session. Summarizing the conclusions that he had drawn from the Commission's consideration of the report, the Special Rapporteur stated as follows:

> "(b)[2] The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;
>
> "(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;
>
> "(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions".[3]

4. These conclusions met with general approval both in the Sixth Committee and in the Commission itself and, although some Commission members expressed doubts as to one or another aspect of the approach taken, the approach was not called into question during consideration of the second report.[4] The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

(b) Questionnaires circulated to States and international organizations

5. At its forty-seventh session, the Commission authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions.[5] In its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those

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[1] A/CN.4/470 and Corr.1.

[2] Subparagraph (a) concerned the amendment of the title of the topic; the original title was "The law and practice relating to reservations to treaties".

[3] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[4] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116-123.

[5] Ibid., *Fiftieth Session, Supplement No. 10* (A/50/10), para. 493.

which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties.[6]

6. Accordingly, the Special Rapporteur drew up a detailed questionnaire that the Secretariat circulated to States Members of the United Nations and to the members of specialized agencies and the parties to the Statute of the International Court of Justice. So far, 32 States[7] have responded to the questionnaire, mostly confining themselves to answering the questions to which the Special Rapporteur had drawn special attention, relating more particularly to the issues dealt with in the second and current reports.[8] Most of the States concerned enclosed with their replies a wealth of very interesting documentation concerning their reservations practice.

7. In addition, the Special Rapporteur prepared a similar questionnaire that was circulated to international organizations that are depositaries of multilateral treaties. So far, 22 such organizations have responded to the questionnaire either completely or partially.[9]

8. The number of replies to the questionnaires,[10] which are long, detailed and technical – since it was only on the basis of such a text that a clear picture could be gained of the reservations practice of States and international organizations[11] – indicates that there is great interest in the topic and confirms that studying it meets a real need.

2. Second report and the outcome

(a) Consideration of the second report by the Commission

9. The second report, which was submitted in 1996, consisted of two entirely different chapters.[12] In the first, the Special Rapporteur set out an "Overview of the study" and made

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[6] Para. 5 of the resolution.

[7] Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, the Holy See, Germany, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. The Special Rapporteur wishes to express his gratitude to these States once again. He hopes that they will be able to supplement their replies and that other States will respond to the questionnaire in the near future.

[8] See para. 6 of the questionnaire's covering note.

[9] Bank for International Settlements (BIS), Council of Europe, Food and Agriculture Organization of the United Nations (FAO) Forum Secretariat, International Atomic Energy Agency (IAEA), International Civil Aviation Organization (ICAO), International Fund for Agricultural Development (IFAD), International Labour Organization (ILO), International Maritime Organization (IMO), International Monetary Fund (IMF), International Telecommunication Union (ITU), Latin American Integration Association (LAIA), Organization for Security and Cooperation in Europe (OSCE), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU), Western European Union (WEU), World Bank (International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA)), World Customs Organization, World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Trade Organization (WTO). The Special Rapporteur wishes to thank these organizations also; he hopes that organizations that have as yet not responded to the questionnaire will do so within the next few months.

[10] The percentages in question – 17 per cent in the case of States (32 out of a total of 187 States that received questionnaires) and 38 per cent in the case of international organizations – may not seem very high, but they by far exceed the proportion normally found in connection with such exercises.

[11] The questionnaires are almost entirely factual. The aim is not to determine the "normative preferences" of States and international organizations but, rather, to attempt to establish, by means of their replies, what their actual practice is and in so doing identify difficulties they encounter.

[12] A/CN.4/477 and Add.1.

a number of suggestions with respect to the future work of the Commission on the topic of reservations to treaties.[13] Chapter II, entitled "Unity or diversity of the legal regime for reservations to treaties", was subtitled "Reservations to human rights treaties" and concluded that despite the great diversity of multilateral treaties, the reservations regime set out in articles 19 to 23 of the Vienna Convention of 1969 on the Law of Treaties and the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations was suitable for all treaties including human rights treaties, owing to its flexibility.

10. Furthermore, in view of the recent practice of human rights treaty monitoring bodies, the Rapporteur expressed the view that the Commission, as the United Nations body chiefly responsible for the progressive development and codification of international law, should state its views in that respect, and he annexed to his second report a draft resolution of the Commission on reservations to human rights treaties.[14]

11. The Special Rapporteur also annexed to his second report a "Bibliography concerning reservations to treaties",[15] a more complete and updated version of which he intends to annex to his fourth report.[16]

12. Owing to lack of time, the Commission was unable to consider the second report in 1996, at its forty-eighth session; the Special Rapporteur briefly presented it at that session, and some members stated their reactions in a very preliminary fashion.[17] However, the report was discussed in depth at the Commission's forty-ninth session, in 1997.[18]

13. This discussion gave rise to an extensive exchange of views in the Commission, and it was thus possible to establish or reaffirm that there was broad agreement on the approach to be taken. In particular:

- Members agreed that in principle the Vienna regime should be preserved and that all that was needed was to remedy its ambiguities and fill the lacunae in it;
- While stressing that the undertaking was ambitious, most speakers reaffirmed their support for the decision taken in the previous quinquennium to prepare a guide to practice accompanied, if necessary, by model clauses.

14. With respect to the legal regime of reservations to normative treaties, including human rights treaties, the Commission referred the draft resolution proposed by the Special Rapporteur[19] to the Drafting Committee; on the basis of the Drafting Committee's report the Commission adopted not a resolution but the "Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties adopted by the Commission".[20]

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[13] A/CN.4/477, paras. 9-50.

[14] A/CN.4/477/Add.1, p. 86.

[15] A/CN.4/478.

[16] The Special Rapporteur wishes to take this opportunity to thank Commission members who kindly provided him with the titles of books and articles that he did not mention in 1996, and to ask all Commission members to transmit to him titles that should be added to the bibliography. He thanks them in advance.

[17] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), paras. 108-140.

[18] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 50-156.

[19] See para. 10 above.

[20] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

(b) Consultation of human rights bodies on the preliminary conclusions of the Commission

15. The Commission also decided to transmit its preliminary conclusions to the human rights treaty monitoring bodies. By means of letters dated 24 November 1997 transmitted through the Secretary of the Commission, the Special Rapporteur sent copies of the preliminary conclusions and of chapter V of the Commission's report on the work of its forty-ninth session to the chairmen of human rights bodies with universal membership,[21] requesting them to communicate the documents in question to the members of their Committees and to inform him of any comments made. He also sent similar letters to the presiding officers of a number of regional bodies.[22]

16. The Special Rapporteur has so far received a response only from the Chairman of the Human Rights Committee, who in a letter dated 9 April 1998 informed him that the Committee welcomed the opportunity to comment on the preliminary conclusions and that it intended to study them and respond in greater detail at a later date; in the meantime, however, the Committee indicated, with respect to paragraph 12 of the preliminary conclusions, that:

> "Regional bodies are not only the intergovernmental institutions which participate in and contribute to the development of practices and rules. Universal monitoring bodies, such as the Human Rights Committee, play no less important a role in the process by which such practices and rules develop and are entitled, therefore, to participate in and contribute to it. In this context, it must be recognized that the proposition enunciated by the Commission in paragraph 10 of the preliminary conclusions is subject to modification as practices and rules developed by universal and regional monitoring bodies gain general acceptance."

Furthermore, the Special Rapporteur has learned that a number of human rights bodies had been interested to take note of the communication in question and that they intended to respond to the Commission's preliminary conclusions. In addition, the chairmen of bodies established pursuant to human rights instruments considered the issue at their meeting in February 1998.

(c) Consideration of the report of the Commission by the Sixth Committee

17. The great number of comments, mostly positive, made on the subject of the second report during the Sixth Committee debate at the fifty-second session of the General Assembly is also indicative of the amount of interest there is in the topic of reservations to treaties: 50 delegations commented on the topic, often making detailed and well-argued remarks.[23]

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[21] Letters were sent to the Chairmen of the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child.

[22] Letters were sent to the presiding officers of the African Commission on Human and People's Rights, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

[23] See A/C.6/52/SR.17-25.

18. The principle of the unity of the reservations regime, stated by the Commission in paragraphs 2 and 3 of its preliminary conclusions, met with wide approval.[24]

19. The discussions concerned above all the role of human rights bodies with respect to reservations, i.e., chiefly paragraphs 5 to 10 of the preliminary conclusions. As indicated in the "Topical summary" prepared by the Secretariat,[25] there were two opposing positions. Some delegations thought that it was for States alone to decide on the admissibility of reservations and to determine the consequences of inadmissibility. A virtually equal number of delegations endorsed paragraphs 5 and 6 of the preliminary conclusions and expressed the view that the admissibility of reservations should be assessed jointly by monitoring bodies, where they existed, and States parties to the human rights conventions.

20. However, almost all delegations that expressed views "agreed with the Commission's Preliminary Conclusion 10 that the rejection of a reservation as inadmissible conferred some responsibility on the reserving State to respond or to take action. Given the consensual nature of treaties, reservations were inseparable from the consent of the State to be bound by a treaty";[26] only two States though otherwise.[27] However, interesting suggestions were put forward *de lege ferenda* on this issue by a number of delegations, with the aim of establishing a dialogue between the reserving State and objecting States,[28] or between the reserving State and the monitoring body,[29] or of institutionalizing a centralized monitoring mechanism.[30]

21. With regard to form, in general, the Commission's initiative of adopting preliminary conclusions and consulting interested human rights bodies was well received by the Sixth Committee. However, one delegation expressed the view that there was no reason to limit consultation in that manner and that all monitoring bodies established under multilateral conventions, whatever their purpose, should be consulted;[31] that concern is reflected in paragraph 4 of resolution 52/156 of 15 December 1997, in which the General Assembly:

> "*Takes note* of the invitation by the International Law Commission to all treaty bodies set up by normative multilateral treaties that may wish to do so to provide, in writing, their comments and observations on the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties ..."

However, the question remains as to exactly which bodies are to be consulted, apart from human rights bodies.

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[24] See the "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session prepared by the Secretariat", document A/CN.4/483, paras. 65-67; just two delegations (the delegations of the Republic of Korea (A/C.6/52/SR.22, para. 7) and, in a more qualified manner, Italy (A/C.6/52/SR.24, para. 82)) expressed the view that special regimes might be useful in certain cases; the model clauses that the Commission intends to adopt would no doubt meet that concern.

[25] A/CN.4/483, paras. 71-82.

[26] Ibid., para. 84.

[27] Costa Rica (A/C.6/52/SR.22, para. 19) and Greece (ibid., paras. 42-44); also see Sweden's statement on behalf of the Nordic countries (A/C.6/52/SR.21, paras. 11-12).

[28] Statements by the United Kingdom (A/C.6/52/SR.19, para. 46) and Austria (A/C.6/52/SR.21, para. 6).

[29] Statements by Liechtenstein (A/C.6/52/SR.22, para. 25) and Switzerland (ibid., para. 85).

[30] Statements by Germany (A/C.6/52/SR.21, para. 46) and Chile (A/C.6/52/SR.22, para. 36).

[31] Statement by Tunisia (A/C.6/52/SR.22, para. 32).

22. Furthermore, while some delegations in the Sixth Committee welcomed the preliminary conclusions, others believed that they had been adopted prematurely.[32] As the Special Rapporteur indicated when he addressed the Sixth Committee, speaking as Rapporteur, that view appears to be based on a misunderstanding:[33] the purpose of the text adopted by the Commission is to respond to recent initiatives on the part of a number of human rights bodies, and the text represents the provisional culmination of the discussion that took place in 1997 on the fundamental issue of the unity or diversity of the reservations regime; to have waited until consideration of the topic had been completed would have meant that neither the Sixth Committee nor the Commission itself would have been able to participate in the discussion initiated by the human rights bodies and, in particular, by General Comment No. 24 of the Human Rights Committee.[34] Furthermore, the preliminary nature of the Commission's conclusions and its decision to consult interested human rights bodies would seem such as to allay the fears that were expressed (which were very much in the minority).

23. In any event, the Special Rapporteur considers that time should now be allowed to play its part: the Commission has taken a preliminary position and has consulted States[35] and the human rights bodies.[36] They must be given time to respond and it seems logical that the Commission should not revert to the topic until it has been apprised of their reactions and has completed its consideration of the most controversial questions left pending by the Vienna Conventions. The Special Rapporteur therefore proposes, in accordance with the programme of work adopted at the forty-ninth session,[37] to submit draft definitive conclusions to the Commission in his fifth report, when consideration of the substantive questions relating to the regime of reservations to treaties has been completed.

24. The discussion in the Sixth Committee likewise gave the representatives of States an opportunity to confirm their agreement with the essential features of the general approach adopted by the Commission. A very great majority of delegations:

Reiterated the support expressed in previous years for the preparation of a guide to practice,[38] and

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[32] Statements by Mexico (A/C.6/52/SR.17, para. 22), the Netherlands (A/C.6/52/SR.21, para. 15), Guatemala (ibid., para. 65), Tunisia (A/C.6/52/SR.22, para. 32), Greece (ibid., para. 48), Switzerland (ibid., para. 87) and Bangladesh (A/C.6/52/SR.25, para. 24).

[33] A/C.6/52/SR.24, para. 97.

[34] CCPR/C/21/Rev.1/Add.6.

[35] In paragraph 2 of resolution 52/156, the General Assembly drew "the attention of Governments to the importance for the International Law Commission of having their views on all the specific issues identified in chapter III of its report and in particular on [...] (b) the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties". Three Governments, those of Monaco, Liechtenstein and the Philippines, have already sent their comments to the Special Rapporteur, who is extremely grateful to them and sincerely hopes that their example will be followed by many other Governments. He intends to give a detailed account of the views communicated to him on this issue in his fifth report.

[36] In its aforementioned observations (see footnote 35), Liechtenstein expressed the hope that non-governmental organizations active in the field of human rights would likewise be invited to express their views. The Special Rapporteur would welcome any communication that these non-governmental organizations might wish to send him.

[37] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 221.

[38] A/CN.4/483, para. 90; only the delegation of the Republic of Korea (A/C.6/52/SR.22, para. 4) expressed a preference for a legally binding instrument, while the delegation of Canada (A/C.6/52/SR.21, para. 41) expressed reservations concerning the need for model clauses.

Called on the Commission to respect the general framework of the Vienna Conventions,[39] the ambiguities and lacunae of which were nevertheless emphasized by many delegations.

25. In particular, the representatives of States requested the Commission to consider the following points:

The precise definition of reservations, especially in comparison with interpretative declarations;

The question of reservations to bilateral treaties;

The legal regime of interpretative declarations;

The precise scope of the concept of object and purpose of a treaty;

The effects of an objection to a reservation;

The problem of the validity of objections;

The consequences of the impermissibility of a reservation; and

The effects of reservations to provisions reproducing rules of *jus cogens*.

The Special Rapporteur proposes to take up each of these problems in due course (some of them this year).

26. Generally speaking, the Special Rapporteur feels that the discussion in the Sixth Committee seems to confirm the validity of the general approach adopted by the Commission since 1995.

(d) Action by other bodies

27. Another sign of the international community's interest in the topic is the action taken by two bodies with which the Commission has a cooperative relationship: the Council of Europe and the Asian-African Legal Consultative Committee.

28. With regard to the former, the Committee of Legal Advisers on Public International Law (CAHDI), at its fourteenth meeting, held in September 1997, considered the preliminary conclusions adopted by the Commission and, more generally, the latter's work on the topic of reservations, and decided to establish a Group of Specialists on Reservations to International Treaties (DI-S-RIT), under the coordination of the representative of Austria, whose terms of reference were approved by the Committee of Ministers of the Council of Europe on 16 December 1997. The Group will be called upon to:

"(a) examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations actually or potentially inadmissible under international law and

(b) consider the possible role of the CAHDI as an 'observatory' of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under international law, and as an

[39] A/CN.4/483, paras. 61, 65 and 90-91. Only the delegations of Sweden (speaking on behalf of the Nordic countries) (A/C.6/52/SR.21, paras. 8 and 9) and, more overtly, the delegation of the Netherlands (ibid., para. 14) questioned the sacrosanct character of the Vienna regime.

observatory of reactions by Council of Europe member States Parties to these instruments."[40]

29. The Group held its first meeting in Paris on 26 and 27 February 1998 and on that occasion had an exchange of views with the Commission's Special Rapporteur. The conclusions drawn up by its presiding officer read as follows:

"The Group shared the view of the ILC that:

– the regime of the Vienna Convention is applicable to all treaties, including normative and human rights treaties;

– the regime should not be changed.

However, it was felt that the issue of the role of monitoring bodies still required further consideration; some delegations were not in full agreement with conclusions 5 and following [of the ILC preliminary conclusions], in particular the articulation between *lex lata* and *lex ferenda* provisions. On the whole, however, the Group was agreeable to the main thrust of the preliminary conclusions."[40bis]

30. The Asian-African Legal Consultative Committee (AALCC) held its thirty-seventh session in New Delhi from 13 to 18 April 1998, chaired by Mr. P. S. Rao. The International Law Commission was represented at the session by Mr. Yamada. It should be noted that AALCC treated the question of reservations to treaties as a special topic and devoted particular attention to it.[41]

B. General presentation of the third report

1. Method used

31. Since there is a quasi-consensus, both in the Commission and among States, that the Vienna regime must be preserved, it would seem appropriate to base the work systematically on the provisions concerning reservations in the Conventions of 1969, 1978 (to the limited extent to which they may be relevant to the general study of that regime) and 1986.

32. The Special Rapporteur therefore proposes to base this report, and indeed the next three reports, on the following general outline:

– Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions on the law of treaties[42] and the *travaux préparatoires* leading to their adoption;

– Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires which he has received[43] will be particularly valuable;

– Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;

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[40] For a general presentation of this Group, see the introductory document for its first meeting, DI-S-RIT(98)1, Strasbourg, 2 February 1998.

[40bis] Document CAHDI(98/8) of 3 March 1998.

[41] At the time when he was drafting this report, the Special Rapporteur did not have a record of this important meeting.

[42] In order to avoid any confusion, these provisions will be systematically printed in bold type.

[43] See paragraphs 5-8 above.

- On the basis of this information, he will propose a series of draft articles that will form the guide to practice which the Commission intends to adopt,[44] together with preliminary commentaries specifying the scope he ascribes to them.[45]

- Where appropriate, the draft articles will be accompanied by model clauses which States could use when derogating from the guide to practice in special circumstances or specific fields.[46]

33. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see the second stage described above).

34. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice (for example, in the case of the "positive" definition of reservations[47]). The Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the guide to practice under consideration. Silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users" – legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations – a reference work that is as complete and comprehensive as possible.

35. The Special Rapporteur wishes to note, however, that despite his efforts to be as exhaustive, precise and rigorous as possible, he is well aware of the imperfections of his work. Since he has no assistance, his approach is necessarily empirical: there is a considerable amount of writing devoted to reservations,[48] practice takes many forms, and the replies to questionnaires already fill several volumes. A systematic analysis would necessitate the recruitment of a team of researchers and/or full-time work. Unfortunately, this is beyond the Special Rapporteur's means. He acknowledges, therefore, that he has often had to proceed by "taking soundings" and to trust his intuition. The Commission's methods of work nevertheless have the advantage of limiting the shortcomings of this method (or absence of method?): by reason of its consideration by the Commission, the individual study becomes a collective one. Furthermore, the reactions of Governments, both individually and collectively in the Sixth Committee, ensure that the work will be realistic and that, where necessary, the draft guide to practice can be brought into line with real needs.

36. On the other hand, the Special Rapporteur wishes to respond in advance to possible future criticism regarding the somewhat lengthy nature of following expositions, especially those concerning the presentation of the *travaux préparatoires* relating to the relevant provisions of the three Vienna Conventions. There are, indeed, grounds for questioning the need for such a detailed description. The Special Rapporteur feels, however, that the description will be useful for at least two reasons. First, and this holds true for all the draft articles prepared by the Commission, it constitutes the basis and justification of the normative provisions (contained in the draft guide to practice) that will be derived from it. Second – and this is particularly true in the case of the present draft – it would seem useful

[44] In order to avoid any confusion, these draft articles will be systematically printed in italics.

[45] The Special Rapporteur will not provide commentaries to the articles of the Vienna Conventions, except when he combines them in a "composite" article – on this point, see paragraph 40 below.

[46] In order to avoid any confusion, these model clauses will be systematically underlined.

[47] See chap. II, sect. 1, para. 1 (b) below.

[48] See the non-exhaustive compilation in the aforementioned bibliography, footnote 15.

for practitioners, and especially Governments, to have at their disposal documentation which is exhaustive (or as exhaustive as possible) in order that they may decide whether, in a given case, it would be appropriate to act on the basis of the proposed guide.

37. Lastly, attention must be drawn to a difficulty peculiar to the present study: the topic under consideration relates to "reservations to treaties" in general. This subject has already been treated in three conventional instruments, and while there is no doubt that the 1969 Vienna Convention is the primary instrument of reference and the starting point for any reflection on the topic, it would be unwise to neglect the 1978 Convention on Succession of States in respect of Treaties or, above all, the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations. In accordance with the procedure followed from the first report onward, which has not been questioned either in the Commission or in the Sixth Committee, the Special Rapporteur intends to study all three Conventions simultaneously and combine the results in a guide to practice which will be "consolidated", in that it will contain provisions relating to reservations to treaties to which States and international organizations are parties and set forth the rules applicable in the case of succession of States.[49]

38. This method has a definite advantage in that it makes it possible to verify the coherence of the existing conventional provisions, carry out useful cross-checks and "test" the solidity of the structure as a whole. Moreover, the rules set forth in one Convention often elucidate or complement those contained in the others(as is shown, for example, in chapter II of this report, in connection with the definition of reservations). Furthermore, the *travaux préparatoires* of each Convention (especially those of 1969 and 1986) are likewise complementary and often clarify each other.

39. Of course, the requisite distinctions will be made whenever necessary. Generally speaking, that does not pose any major problems, since the 1978 and 1986 Conventions seem to be the consequences, prolongations and illustrations of provisions of the 1969 Convention relating to specific, quite clearly defined issues. In some cases, however, the exercise will inevitably lead to the cumulation of existing provisions and make it necessary to reflect on the way in which they combine and relate to each other.

40. In certain cases it will also lead to the adoption of "composite texts" combining elements from each of the Vienna Conventions or from two of them. The definition of reservations, as presented in chapter II of this report, exemplifies this method, which must be used if comprehensive codification is the objective:

- The definition of reservations to treaties between States is contained in article 2, paragraph 1 (d), of the 1969 Convention;
- If the aim is to define reservations to treaties "in general", this definition must be completed by that contained in article 2, paragraph 1 (d), of the 1986 Convention;
- Moreover, when the 1969 Convention was adopted, the question of succession of States was deliberately ignored;[50] during the preparation of the 1978 Convention, however, it was noted that the phenomenon of State succession had an impact on the definition of reservations, at least as conceived by the drafters of the three Conventions.

[49] The fifth part of the "provisional general outline" set forth in document A/CN.4/477 (see para. 42 below): "V. Fate of reservations, acceptances and objections in the case of succession of States".

[50] See article 73 of the 1969 Convention.

In a case such as this, simply juxtaposing the existing texts in the guide to practice would create very great complications for users; the problem can only be dealt with properly in a composite text.[51]

41. It may be noted that this course would be consistent with the hopes, or rather the predictions, of Paul Reuter who, during the discussion of his third report, envisaged that "it might perhaps be decided some day to try to combine the two sets of articles"[52] and that an effort would be made to solve the problems raised by "any adjustment which the existence of two conventions might necessitate".[53] That is also one of the aims of the guide to practice, a fact which does not facilitate its preparation.

2. Plan of the third report

42. In chapter I of his second report, the Special Rapporteur presented a provisional "general outline of the study" that he intended to carry out.[54]

43. Very few comments were made on this general outline during the consideration of the second report in 1997, at the forty-ninth session.[55] However, the programme of work adopted by the Commission at that session endorsed the main contours of that outline,[56] leading the Special Rapporteur to believe that he can follow them in preparing his future reports, including the third, but without regarding them as a rigid guide and adapting and clarifying them as appropriate.

44. That being so, and in accordance with the indications given in 1997 and in the programme of work adopted by the Commission,[57] this report covers parts II and III of the provisional general outline, dealing respectively with the definition of reservations[58] and with the formulation and withdrawal of reservations, acceptances and objections.[59]

45. The Special Rapporteur nevertheless faced a problem concerning the legal regime of interpretative declarations. At the outset, he intended to treat this very important problem[60]

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[51] See para. 82 below.

[52] Reuter was referring here to the Vienna Convention on the Law of Treaties and the draft articles on the law of treaties between States and international organizations or between international organizations.

[53] *Yearbook ... 1974*, vol. I, 1279th meeting, 17 June 1974, para. 52.

[54] A/CN.4/477, paras. 37-50.

[55] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116-123.

[56] Ibid., para. 221.

[57] Ibid.

[58] The provisional outline contains the following headings: (a) positive definition; (b) distinction between reservations and other procedures aimed at modifying the application of treaties; (c) distinction between reservations and interpretative declarations; (d) the legal regime of interpretative declarations; (e) reservations to bilateral treaties (A/CN.4/477, para. 37).

[59] Part III is subdivided into three sections:

A. *Formulation and withdrawal of reservations*: (a) acceptable times for the formulation of a reservation; (b) procedure regarding formulation of a reservation; (c) withdrawal.

B. *Formulation of acceptances of reservations*: (a) procedure regarding formulation of an acceptance; (b) implicit acceptance; (c) obligations and express acceptance.

C. *Formulation and withdrawal of objections to reservations*: (a) procedure regarding formulation of an objection; (b) withdrawal of an objection (Ibid.).

[60] Several delegations drew attention to this problem during the discussion in the Sixth Committee (see A/CN.4/483, para. 91). See also the positions on this issue taken by several members of the Commission at the forty-ninth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 113).

as an element of part II, concerning the definition of reservations.[61] However, given the wealth of material it became clear that this solution was very unsatisfactory, especially since it would have been illogical to establish the legal regime of interpretative declarations before completing consideration of the legal regime of reservations. Thus, there were two options: a separate chapter could be devoted to the legal regime of interpretative declarations (which would have been placed right at the end of the study), or that regime could be considered in parallel with the regime of reservations, to which it would in a way constitute a counterpoise.

46. After some hesitation the Special Rapporteur chose the second alternative, and therefore plans systematically to present the draft articles of the guide to practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations. The two following chapters will illustrate this approach, since they deal simultaneously with the problems posed by the definition and formulation of reservations on the one hand and of interpretative declarations on the other.

47. That being so, this report will follow the following general plan:

Chapter II. *Definition of reservations* (and of interpretative declarations);

Chapter III. *Formulation and withdrawal of reservations* (and of interpretative declarations), *acceptances and objections to reservations* (and to interpretative declarations).[62]

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[61] See footnote 58 (d) above.

[62] Interpretative declarations are not expressly mentioned in the titles of these chapters in order to avoid making them too cumbersome.